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### Case Preview: When Is a Fleeing Suspect “Seized”?

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**Jeffrey Bellin** *Guest*

Posted Tue, October 13th, 2020 9:00 am

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## Case preview: When is a fleeing suspect “seized”?

The Fourth Amendment prohibits unreasonable “searches” and “seizures.” On Wednesday, the Supreme Court is scheduled to hear oral argument in *Torres v. Madrid*, a case that will provide important guidance on what constitutes a Fourth Amendment seizure. Here’s a rundown of the case starting with the relevant facts and procedural history, followed by a discussion of the legal issues and finally a couple of things to watch for at the argument.

### Facts

In the early morning hours of July 15, 2014, New Mexico state police descended on an apartment complex in Albuquerque. Officers Janice Madrid and Richard Williamson approached a Toyota FJ Cruiser that was backed into a parking spot with its engine running. The officers tried to speak to the driver, Roxanne Torres. Torres, who says she “thought she was the victim of an attempted car-jacking,” drove off.

Madrid and Williamson, who say they feared for their safety, fired their weapons. Torres was hit twice but did not stop. She drove to a nearby parking lot, swapped her severely damaged FJ Cruiser for an unattended Kia Soul with its motor running, and drove 75 miles to Grants, New Mexico — or, as the briefing helpfully informs the justices, “approximately the distance from this Court to Harpers Ferry, West Virginia.” Torres promptly checked into the hospital, where police arrested her the next day.

Two years later, Torres filed this case, a civil rights lawsuit against Madrid and Williamson, alleging that the shooting was an unreasonable Fourth Amendment “seizure.” The district court granted summary judgment in favor of the officers, ruling that the shooting did not constitute a “seizure” at all. The U.S. Court of Appeals for the 10th Circuit agreed. That’s the ruling the Supreme Court will review in this case, with significant implications for the admissibility of evidence against criminal defendants, as well as the viability of excessive-force prosecutions and lawsuits against police.

### Discussion

The basic test for identifying a Fourth Amendment seizure comes from Justice Potter Stewart’s opinion in *United States v. Mendenhall*: “[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”

If that were the only test, Torres would have won already. Nothing says “you are not free to leave” like two police officers with guns drawn, firing bullets into your car. But there is a catch. In *California v. Hodari D.*, the Supreme Court offered an addendum to the seizure definition for situations when you are not free to leave but you leave anyway.

*Hodari D.* held (7-2) that a person being chased by an officer (and so not free to leave) is not actually seized until caught. The following language from Justice Antonin Scalia’s majority opinion is critical to this case:

The word “seizure” readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. (“She seized the purse-snatcher, but he broke out of her grasp.”) It does not remotely apply, however, to the prospect of a policeman yelling “Stop, in the name of the law!” at a fleeing form that continues to flee. That is no seizure.

*Hodari D.* makes clear that a person fleeing from a show of authority is not seized. But it also suggests a different answer once there is physical contact.

Starting with the language in *Hodari D.*, Torres and the eight amici supporting her in the case present a blizzard of overlapping textual, historical and policy arguments for concluding that the shooting in this case was a seizure. The U.S. solicitor general, arguing in support of Torres, writes that this conclusion “is required by the plain text of the Fourth Amendment, follows from this Court’s precedent defining a ‘seizure,’ and is consistent with common law.”

The officers’ response centers on the textual point. From their perspective, the key to the case is that to be seized means to be stopped, and Torres kept going. Offering the justices a bright-line rule, the officers contend: “The citizen’s ‘freedom of movement’ must actually be physically restrained or controlled for a seizure to occur.” After all, if Torres was seized in Albuquerque, how did she travel 75 miles to a hospital in Grants?

Torres and her amici have an answer. Torres was seized the moment she was shot. She was seized again when police arrested her the next day. In between those two events, she was not seized. Torres can concede that there was no “continuous seizure” because she only needs one moment. If the initial, momentary seizure was unreasonable, the officers violated her Fourth Amendment rights.

Torres’ argument is stronger than most momentary-physical-contact-seizure claims for two reasons: She was seriously injured by the bullets, and she immediately felt their effects. One can imagine weaker cases in which an application of physical force causes only fleeting or unnoticed impacts, like a brief grasp of the wrist or a bullet stopped by a lucky belt buckle. But in this case, the officers fired two bullets into Torres’ torso. Torres testified at her deposition that immediately after she was shot, one of her arms became temporarily paralyzed. (Curiously, the lower-court opinions overlook this aspect of Torres’ testimony — which must be credited at the summary-judgment stage.) Quoting another Supreme Court case, *Graham v. Connor*, the officers acknowledge that “a Fourth Amendment seizure occurs whenever government actors have ‘in some way restrained the liberty of a citizen.’” They will have to convince the justices that being shot twice at close range resulting in partial paralysis is not a restraint on one’s liberty.

On precedent and history, the officers largely play defense. As already noted, the court’s clearest precedent, *Hodari D.*, suggests that the actual application of physical force with an intent to stop someone, even if unsuccessful, constitutes a seizure. As for Framing-era history, most of the briefing agrees that at the time the Fourth Amendment was adopted, any physical contact during an attempt to restrain a suspect constituted a common law “arrest,” the quintessential seizure. But whether Framing-era citizens would have thought that Fourth Amendment seizure rights tracked the varying common law arrest doctrines, and how much that should matter given the vast differences in Framing-era policing, remain perhaps unresolvable questions.

## What to look for at argument

There are two things to look for in the upcoming argument.

### (1) How broadly is the court inclined to rule?

The court could rule for Torres here, while still leaving room for a different outcome in cases with less substantial physical contact. The District of Columbia Court of Appeals, for example, [found](#) no seizure in a case in which a suspect wriggled out of his coat to escape an officer’s grasp. In those circumstances, despite the physical contact, the suspect (as opposed to the suspect’s jacket) arguably was never “seized.” And that case, unlike this one, raises a potential conflict, hinted at by some of the amici, between the constitutional text and the common law of arrest. The justices may want to avoid confronting that conflict by ruling narrowly in this case.

A ruling for the officers, on the other hand, might leave open the possibility that some degree of actual impairment — handcuffs placed on a suspect who then breaks away, or a blow that measurably slows the suspect — can create a seizure even if the suspect is not immediately stopped.

### (2) Is the court thinking about “searches” too?

“Searches” and “seizures” are strongly linked in the Fourth Amendment, separated by only a conjunction. This suggests that “search and seizure” cases should share a similar interpretive methodology. Yet currently, the two doctrines are nothing alike. Search cases, powered by the “reasonable expectation of privacy” test, are a mixture of armchair philosophy, speculation about societal norms and [strained allusions to dystopian fiction](#). By contrast, seizure cases appear to hinge on straightforward textual interpretation. The court determines whether a seizure occurred by applying the commonly understood meaning of a relatively clear term. Given the plethora of search cases queuing up on the horizon, and the justices’ increasing frustration with their convoluted search doctrine, this striking contrast may be the most significant part of the case. If the justices enjoy the analytical clarity of textual seizure analysis, they may begin to contemplate the benefits of a [similar methodological approach](#) to the term “search.”

Posted in [Torres v. Madrid](#), [Featured](#), [Merits Cases](#)

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